IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 5828 of 2007
WITH
CRIMINAL MISC.APPLICATION No. 5564 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Applicant(s)
Versus
KISHORBHAI RATILAL CHALIYAWALA - Respondent(s)

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Appearance :
IN CR.MA 5828 OF 2007 MR.DIPEN DESAI APP for Applicant(s) : 1,
IN CR.MA 5564 OF 2007 MS.ARCHNA ACHARYA for applicant
RULE SERVED for Respondent(s) : 1,
MR SHAKEEL A QURESHI for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 26/09/2007

ORAL JUDGMENT

1. Both the petitions challenging the same order dated 30.03.2007 of learned Additional Sessions Judge, Surat releasing the respondent on

bail were argued and heard together and are disposed by this common judgment. While one of the petitions is filed by the original complainant, the other is filed by the State to challenge the impugned order substantially on similar grounds. The respondent concerned is stated to be an advocate and accused of offences punishable under Sections 408,420,467,468,471, 477-A, 120-B and 409 of the Indian Penal Code vide F.I.R. dated 16.12.2005 which was registered as C.R.No.266 of 2005 in Athwalines Police Station of Surat. Pursuant to that F.I.R., petitioner was arrested as late as on 26.11.2006 and taken into judicial custody on 30.11.2006. Upon investigation of the offences, first chargesheet dated 04.05.2006 was filed naming eight persons as accused and three other persons, including the petitioner, were stated to be absconding. After arrest of the respondent, second supplementary chargesheet dated 03.12.2006 was filed wherein the petitioner is shown as accused person for the offences punishable under Sections 409, 420, 465, 467, 468, 477-A, 471, 120-B, 384, 385 and 386 of the Indian Penal Code and Sections 147,71 and 94 of the Gujarat Co-operative Societies Act, 1961.

2. It was submitted on behalf of the petitioner that the petitioner was not available

for 11 months before he was arrested. In his capacity as Secretary of Surat Modhvanik Urban Co-operative Credit Society Limited, he had been involved in a huge fraud and siphoning of money which were deposited in the society by poor labourers, hawkers and such other humble people. It was submitted that at the end of the investigation and even at the time of making the impugned order, there was sufficient material to *prima facie* indicate active involvement of the respondent in loss, mismanagement or misappropriation of amounts exceeding Rs.8,81,00,000/-. It was also submitted that Chairman and Manager of the society, the other main accused persons, were not released on bail and their bail applications were rejected and such orders rejecting their bail applications were confirmed upto the Hon'ble Supreme Court. Despite these facts and disregarding the relevant considerations, the respondent was released on bail by the impugned order, according to the submission.

3. Learned counsel Mr.Shakeel Kureshi for the respondent concerned submitted that the respondent was a respectable professional and a public figure with some reputation and he was all throughout available for investigation but not arrested by the police immediately after the

complaint. He further submitted that, by now, trial against all the accused persons had commenced and 16 witnesses out of total 311 witnesses were already examined. On that basis, he submitted that liberty of the respondent may not be curtailed at this stage when there was no scope for allegation of tampering with any evidence and as the respondent was all throughout available and was not violating any of the conditions on which he was released on bail.

4. Learned counsel Mr.Qureshi relied upon judgment of the Supreme Court in ***Ramcharan v. State of M.P. [(2004) 13 SCC 617]*** to submit that different considerations have to be weighed while dealing with applications for cancellation of bail and for grant of bail respectively. Judgment in ***Rajiv Ranjan Singh 'Lalan' (VIII) and Another v. Union of India and Others [(2006) 6 SCC 613]*** was relied upon to submit that delay in conduct of the trial not attributable to the accused cannot be a ground for cancellation of bail when it was not proved that any of the bail conditions was violated. Judgment of ***V.D.Chaudhary v. State of U.P. [(2005) 12 SCC 304]*** was relied upon to point out that, even in the case where the court had found a fit case for cancellation of bail, considering the fact that prosecution evidence was practically closed, bail was not cancelled.

Judgment of the Supreme Court in ***Subhendu Mishra v. Subrat Kumar Mishra [AIR 1999 SC 3026]*** reiterating the ratio in ***Dolat Ram v. State of Haryana [(1995) 1 SCC 349]*** was cited in support of the submission that very cogent and overwhelming circumstances were necessary for an order directing the cancellation of bail already granted.

5. According to the impugned order, although it was a serious case of alleged misappropriation of huge amounts by several accused persons in complicity with each other, the role of each of the accused persons had to be examined. It is observed that the investigation did not appear to be impartial in so far as several persons named as accused persons in the F.I.R. were cited as witnesses after investigation. And affidavit of one of the informants did not indicate involvement of the respondent in the alleged acts of misappropriation. Learned Sessions Judge has referred to statements of several witnesses before recording the finding that there was no material to indicate involvement of the respondent in tampering with Fixed Deposit Receipts and, in any case, those were offences related to documents. It is held in the impugned judgment that the respondent appeared to have only discharged his duties as Secretary and, if

there were any irregularities, they may not amount to offences since a Secretary has to carry out the instructions of the Directors. Thus, in short, on the basis that there was no evidence of misappropriation by the petitioner and he appeared to have only carried out the instructions of the Directors and in view of the fact that he would be available at the time of trial, the impugned order to release him on bail was made.

6. Apparently, the fact that the respondent was not available or was not arrested for 11 months even as more than Rs.8,81,00,000/- of the Credit Society had been lost and the society had come to be closed to the dismay and detriment of so many small depositors was completely ignored by the Sessions Court. The fact that other main co-accused persons were not released on bail even by the higher Courts was also ignored by the Court and obviously unfounded and gratuitous observations were made to suggest that the respondent had to carry out instructions of the Directors and the offences could have happened in *bonafide* discharge of his duties. It was pointed out from the statements of a number of witnesses including the statements of Akshaykumar, Mahendrabhai, Ajay Shantilal, Chetanbhai Bodawala, Jayantbhai Chadawala,

Anuradhaben Hirenbhai, Iqbal, Sanjay Benwala, Rakeshbhai Khandubhai, Naresh Ahir, Ashok Babubhai and Kiritbhai Savani, the Special Auditor that, *prima facie,* the petitioner was actively involved in day-to-day affairs of the credit society and had even derived direct or indirect benefit by prematurely encashing the fixed deposits of his friends and relatives before the society had to be closed. Therefore, in short, the conclusions drawn by learned Additional Sessions Judge in the impugned judgment were perverse. The aspect of seriousness of the offences and larger interest of prosecution, society and the State was not considered at all.

7. As observed in **State of Gujarat V/s. Lalji Popat and others [1988(2)G.L.H. 114]** by Justice M.B. Shah (As His Lordship then was), the prospect of victim or his relatives indulging in private retribution who would feel helpless and may believe that law may not protect them and the larger interests of public, society or the State are relevant factors which are required to be taken into consideration for deciding bail application. Similarly nature of the charge and the punishment to which the accused may be liable, if convicted are also relevant considerations. The Court is required to

exercise the discretion of granting bail judicially after following the well settled principles. If the Sessions Court has ignored those criteria, either intentionally or arbitrarily, then this Court has jurisdiction to set aside the order. It is not the law that once the accused is released on bail on erroneous ground, till he tempers with the evidence or till he absconds, the High Court has no authority to interfere with that order. Later on, it is observed by the Hon'ble Supreme Court in **Puran etc. etc. V/s. Rambilas and Another etc.etc. [JT 2001(5) SC 226]** and reiterated in **Pandit Dnyanu Khot V/s. State of Maharashtra [2002(3)G.L.H.279]** that the concept of setting aside unjustified, illegal or perverse order is totally different from the concept of cancelling bail on the ground that the accused misconducted himself or because of some new facts requiring such cancellation.

8. It was pointed out that, in the same criminal case, a woman, namely Miraben R. Modi, implicated as manager of the society was not released on bail by this Court and the Hon'ble Supreme Court had, by order dated 13.11.2006 in Special Leave to Appeal (Cri) No.5519 of 2006, found her case not fit for interference under Article 136 of the Constitution. An order of this Court refusing bail in similar circumstances

was confirmed by the Hon'ble Supreme Court in **Himanshu Chandravadan Desai and others V/s. State of Gujarat [AIR 2006 SC 179]** with the following pertinent observations:-

> “7..... The crime in which the petitioners are involved is very serious involving a conspiracy to cheat and defraud public institutions in a systematic manner and the punishment is likely to be severe in the event of conviction. The High Court has recorded a finding that the material shows that the petitioners are *prima facie* involved in the offence.....On account of the fraudulent activities of the then Managing Director and Appellant No.1 (the then Director) and Appellants Nos.2 and 3, nearly Rs.23 crores is due from Bhavika Creations alone. Having regard to huge amounts involved in the systematic fraud, there is a danger of the appellants absconding, if released on bail, or attempting to tamper with the evidence by pressurizing witnesses. In the circumstances, we do not find any reason to interfere with the order refusing bail as grant of the relief sought may result in thwarting the course

of justice.....”

9. In the facts and for the reasons discussed hereinabove, since the important observations and findings in the impugned judgment are found to be perverse and illegal, the judgment and order is set aside and the bail granted to the respondent consequently stands cancelled. Rule in each of the petitions is made absolute accordingly with no order as to costs. The offer of learned counsel for the respondent to repay or redeposit a small part of the amounts which were encashed by a number of friends and relatives of the respondent as a gesture for showing his *bonafides* is noted. His request for staying the operation of this order for a period of four weeks is rejected since there is no justification for granting such request. However, the respondent shall be permitted to surrender before the trial court on or before **05.10.2007.**

(D.H.WAGHELA, J.)

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